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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 644

BANKS & RUMBAUGH, *Petitioner*

VERSUS

MAURICE J. TOBIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and Brief in Support of Petition

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Summary Statement of the Matter Involved

Commencing about January 15, 1951, respondent's representative, Edward Russell Smith, wage-hour in-

vestigator of the United States Department of Labor, with the assistance of petitioner's personnel, made an investigation of the books and records of petitioner covering the period 1949 and 1950 up to January 15, 1951. (R. 20, 29, 32). Smith testified at the hearing that he obtained all information needed from the records (R. 36, 37), and that both he and the Wage and Hour Division of the Department of Labor had determined that petitioner was covered by the Fair Labor Standards Act. (R. 38). Subsequently, in the absence of petitioner's president, H. L. Banks, Smith attempted to have petitioner's office girl prepare and hand over to him checks for him to distribute among petitioner's employees, which she refused to do. (R. 20, 21). Later Smith informed H. L. Banks that he, Smith, thought that petitioner was covered by the Fair Labor Standards Act and that it owed certain employees for work they had done. (R. 20). H. L. Banks, on advice of his attorney, denied that petitioner was covered by the Act. (R. 20). H. L. Banks testified that about the end of March, 1951, Smith returned, asked if the man had been paid, and threatened to put petitioner out of business if they were not paid. (R. 20, 21).

Beginning about August 9, 1951, Smith again appeared and again demanded the books and records covering the period preceding January 15, 1951, which demand was

refused upon the ground that petitioner was not covered by the Fair Labor Standards Act. (R. 23, 35).

The subpoena duces tecum here involved was served upon petitioner by Smith on October 1, 1951, requiring petitioner, at a time and place stated, to produce all its time, payroll and work records covering the period from July 1, 1950 to September 26, 1951. (R. 10-11). Petitioner's representatives appeared at the time and place designated, but refused to produce the records demanded. (R. 4, 14, par. 10).

Respondent applied to the United States District Court for the Western District of Texas for an order to compel petitioner to comply with the subpoena and to produce the records. (R. 1-11). In its answer, petitioner denied that it or its employees were engaged in the production of goods for interstate commerce, and alleged that they were engaged in work of an essentially local nature and for that reason were not within the coverage of the Fair Labor Standards Act. (R. 14-15).

The District Court held that it had jurisdiction of the parties and of the subject matter; that it had jurisdiction to inquire into the question of whether petitioner or its employees were covered by the Fair Labor Standards Act; and upon the evidence adduced at the hearing held

that the petitioner and its employees were not within the scope of the coverage of that Act, and denied the application of respondent. (R. 46).

Respondent applied to the United States Court of Appeals for the Fifth Circuit. (R. 54). That court reversed the judgment of the District Court, and remanded with direction that an order be entered to secure enforcement of the subpoena. (R. 59, 60).

II. Jurisdictional Statement

The statutory provision believed to sustain the jurisdiction of this court is section 1254, subsection (1), of Title 28 of the United States Code, which provides that cases in the courts of appeals may be reviewed by this court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The following case is believed to sustain the jurisdiction of this court: *Brooklyn Savings Bank v. O'Neill*, 324 U. S. 697 (1945).

The United States Court of Appeals for the Fifth Circuit, acting within its jurisdiction under Section 1291 of Title 28 of the United States Code, reversed the final order of District Court denying the application of respondent for enforcement of a subpoena duces tecum issued under alleged authority of the Fair Labor Standards Act, c. 676,

52 Stat. 1060 (1938), as amended, (29 U. S. C. 201 et seq., and supp. (1952)). (R. 59, 60).

The question involved (see III. below) is substantial for the reason that it bears upon the extent of the jurisdiction of the District Court in a hearing on an application for the enforcement of administrative subpoenas of every kind addressed to any person, under authority of any law, or similar process or demand, to inquire into the jurisdiction of the agency involved and in so doing to adjudicate the issue of coverage under the Act under which the agency is proceeding.

The statutes of the United States here involved are:

Section 6 of the Federal Administrative Procedure Act, c. 324, 60 Stat. 237 (1946), 5 U. S. C. A. Sec. 1005, which provides in part as follows:

"Sec. 1005. Ancillary Matters.

"Except as otherwise provided in this chapter—

* * *

"(c) Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extend that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue

an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to reply."

The date of the judgment sought to be reviewed by certiorari is January 14, 1953, and the date of this application for certiorari is March 2, 1953.

III. Questions Presented

The questions in this case are whether the District Court erred:

(1) In holding that it had jurisdiction to inquire into the question of coverage in a proceeding to enforce the demands of the administrative subpoena involved;

(2) In holding that the petitioner and its employees were not within the scope of the coverage of the Fair Labor Standards Act;

(3) In denying the application for enforcement of the subpoena.

IV. Reasons Relied on for the Allowance of the Writ

1. The decision of the United States Court of Appeals for the Fifth Circuit as to the proper construction of Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 237, 5 U. S. C. A. Sec. 1005 (c), in holding that this provision gives no authority to the courts to:

(1) determine whether the person and the subject matter to which an administrative subpoena is directed are within the jurisdiction of the agency seeking to enforce the subpoena; or

(2) to adjudicate the issue of coverage under the Act under the alleged authority of which the agency is proceeding in seeking enforcement of the subpoena;

involves an important question of Federal law which has not been but should be settled by this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said court had in the case numbered and entitled on its docket, No. 14191, MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Appellant, versus BANKS & RUMBAUGH, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Fifth

Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated March 2, 1953.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF LABOR,
Respondent

Brief in Support of Petition for Writ of Certiorari.

I. Opinions of Courts Below

The opinion in the United States Court of Appeals for the Fifth Circuit, not yet reported, is dated January 14, 1953 (R. 52-59).

The decree of the District Court for the Western District of Texas, unreported, is dated April 14, 1952. (R. 46-47).

II. Jurisdiction

1. The date of the judgment to be reviewed is January 14, 1953. (R. 52).

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 1254, subsection (1), of Title 28 of the United States Code.

3. The United States Court of Appeals for the Fifth Circuit, acting within its jurisdiction under Section 1291 of Title 28 of the United States Code, reversed the final order of the District Court denying the application of respondent for enforcement of a subpoena duces tecum issued under alleged authority of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (1938), as amended, (29 U. S. C. 201 et seq., and supp. (1952)). (R. 59, 60).

4. The following case is believed to sustain the jurisdiction of this court: *Brooklyn Savings Bank v. O'Neill*, 324 U. S. 697 (1945).

III. Statement of the Case

This has already been stated in the preceeding petition for review by certiorari under I (pp. 1-4) of said petition, which is hereby adopted and made a part of this brief.

IV. Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in holding that the District Court had no

authority to inquire into the question of coverage of petitioner and its employees under the Fair Labor Standards Act in a hearing on an application for enforcement of an administrative subpoena issued under that Act. (R. 54, 59).

2. The United States Court of Appeals for the Fifth Circuit erred in reversing the judgment of the District Court. (R. 59).

V. Summary of the Argument

Point A

The District Court had jurisdiction in this cause to inquire into the legal and factual situation to determine whether the petitioner (respondent in the District Court) and subject matter to which the subpoena was directed were within the jurisdiction of the agency which issued the subpoena, for the following reasons:

(1) Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), specifically vests such authority in the Court; and

(2) In the instant case the agency by its testimony adduced at the hearing acknowledged that it had already determined that petitioner (respondent there) was covered by the Fair Labor Standards Act and had directed him to comply with its orders,

so that the additional investigation sought to be effectuated by the subpoena would be repetitious, arbitrary, capricious and unreasonable.

Point B

Having exercised its jurisdiction in this case the District Court correctly found that neither petitioner (respondent there) nor its employees were within the scope of the coverage of the Fair Labor Standards Act, for the reason that they were engaged in work of an essentially local nature not subject to the provisions of the Act, being new and original construction of a local nature.

VI.

ARGUMENT

Point A

The District Court had jurisdiction in this cause to inquire into the legal and factual situation to determine whether the petitioner (respondent in the District Court) and subject matter to which the subpoena was directed were within the jurisdiction of the agency which issued the subpoena, for the following reasons:

(1) Section 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), specifically vests such authority in the Court; and

(2) In the instant case the agency by its testimony adduced at the hearing acknowledged that it had already determined that petitioner (respondent there) was covered by the Fair Labor Standards Act and had directed him to comply with its orders, so that the additional investigation sought to be effectuated by the subpoena would be repetitious, arbitrary, capricious and unreasonable.

Sec. 6 (c) of the Federal Administrative Procedure Act, c. 324, 60 Stat. 240 (1946), (5 U. S. C. 1005 (c)), provides in part as follows:

> "Sec. 1005. Ancillary matters.
>
> "Except as otherwise provided in this chapter— * * * (c) Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. *Upon contest the court shall sustain any such subpena or similar process or demand to the extent that is found to be in accordance with law* * * *" (Italics supplied.)

The effect of the decision rendered by the Court of Appeals for the Fifth Circuit is to hold that the enactment of the Federal Administrative Procedure Act and more particularly Section 6 (c) thereof did not abrogate the decisions of this court in *Endicott Johnson Corporation v. Perkins*, 217 U. S. 501, and *Oklahoma Press Publishing Co. v. Walling* 327 U. S. 186, which held that, on an application by an administrative agency to the District

Court for enforcement of a subpoena duces tecum, the Court was not authorized to decide the question of coverage in the enforcement proceeding.

It is the position of petitioner that the words: "in accordance with law" as used in Sec. 6 (c) of the Federal Administrative Procedure Act as set out hereinabove in this argument means substantially the same thing as the words: "including the authority or jurisdiction of the agency" and that as reflected by the remarks of Congressman Walter, a member of the House Committee on the Judiciary, as well as by the report of the House Committee on the Judiciary and comments of the Senate Judiciary Committee, all as hereinafter set out, Congress plainly intended by enacting the Federal Administrative Procedure Act to limit and in fact to expunge the harsh ruling enunciated in the *Endicott Johnson* and the *Oklahoma Press* cases, both *supra*.

This position is conclusively established by the following quotation of comments of the Senate Judiciary Committee on the revised text of Sec. 6 (c) of the Federal Administrative Procedure Act as set forth in Senate Document No. 248, 79th Cong., 2d Sess. (1946), at Par. (3), Page 28:

> "(3) *Private parties urge that after the word 'be' in the second sentence there be added, 'within the jurisdiction of the agency and otherwise', so that no administrative subpena may be enforced beyond the lawful jurisdiction of the agency. It is felt that*

'in accordance with law' as now stated [in the revised text set forth above] *means that.* * * *"

Said Sec. 6 (c) later became Sec. 6 (c) of the Federal Administrative Procedure Act without significant change.

The pertinent remarks made by Congressman Walter on this subject were as follows:

"Subsection (c) of Section 6 provides that, where Congress has authorized agencies to issue subpeonas, private parties may secure them upon an equality with Government representatives and without any more than a general showing of relevance and reasonable scope of the information sought. *Where administrative subpeonas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpena is found to be in accordance with law. This is a definite statutory right and is applicable to subpeonas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see Endicott Johnson Corp. v. Perkins* (317, U. S. 501, 507, 509, 510 (1943)), *have been held inapplicable. Also, the term 'in accordance with law' does not mean that a subpena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpena is directed are within the jurisdiction of the agency which has issued the subpena.*" Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) 293, 344, 349, at 363. (Italics supplied.)

The report of the House Committee on the Judiciary, House Report No. 1980, 79th Congress, 2d Sess., (1946), dealing with H. R. 5988, which subsequently became the Federal Administrative Procedure Act, further supports this view, as shown by the following quotation:

> "* * * *The section constitutes a statutory limitation upon the issuance or enforcement of subpenas in excess of agency authority or jurisdiction, in connection with any agency function or authority.* * * * *courts* * * * *should* * * * *inquire generally into the legal and factual situation and be satisfied that the agency could lawfully have jurisdiction. The section expressly recognizes the right of parties subject to administrative subpenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance. In such contests, the court is required to determine all relevant questions of law.*" Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) 233, 265. (Italics supplied.)

Clearly the Congressional intent is best expressed by the members of the Congress themselves, and not by the Attorney General, the National Labor Relations Board, or other administrative agencies, and ought to be controlling in determining the Congressional intent.

The above quotations show the legislative intent of Congress in plain and unambiguous language and we ask that the court construe the Federal Administrative Procedure Act accordingly.

However, if this court should be of the opinion that the Federal Administrative Procedure Act, contrary to the

intention of Congress as expressed by Congressman Walter and the Judiciary Committees of both the House and the Senate, did not abrogate the holdings in the *Endicott Johnson* and *Oklahoma Press* cases, both *supra*, then petitioner submits that Judge Thomason, the trial Court, was nevertheless correct in going into the applicability of the Fair Labor Standards Act to this petitioner and into the jurisdiction of the agency on the subpoena hearing involved herein for the reason that, as admitted by the agents for the respondent seeking the subpoena, they (the agents and respondent) had already determined in their previous investigation that petitioner was covered by the Act, (R. 38, 39), and had directed that petitioner comply with their orders (R. 20, 21), so that under those facts and circumstances the trial court was clearly justified in concluding that this determination by the agency put the question of coverage squarely in issue, and that any further investigation would be repetitious, arbitrary, capricious and unreasonable, so as to justify the Court in inquiring into the jurisdiction of the agency and the coverage of petitioner and its employees under the Fair Labor Standards Act and in finding that petitioner and its employees were not in fact covered by that Act and in denying the application for an order compelling compliance with the subpoena.

Point B

Having exercised its jurisdiction in this case the District Court correctly found that neither petitioner (respondent

there) nor its employees were within the scope of the coverage of the Fair Labor Standards Act, for the reason that they were engaged in work of an essentially local nature not subject to the provisions of the Act, being new and original construction of a local nature.

The sole ground set forth in the complaint to show that this petitioner is subject to the Act is set out at Paragraph 5 of said complaint in the following language:

> "5. On information and belief at all times hereinafter referred to, the company [petitioner] has engaged at its place of business in Odessa, Texas, and elsewhere, in the production of goods for interstate commerce, as that term is defined by the Act, in that it has been engaged in *oil field construction work* for concerns engaged in the drilling for and production of crude petroleum, substantial quantities of which are thereafter shipped in interstate commerce in its crude form or as a refined product thereof." (R. 2-3). (Italics supplied.)

The term "oil field construction work" means and connotes the new and original construction of such permanent facilities as buildings, slush pits, sewer lines, septic tanks, water lines and gas lines in new oil field camps, water systems, fire walls around new storage tanks as a part of the original construction of such tanks before they are put into use, laying new field gathering lines, and laying foundations for new oil field storage tanks, but does not include reconstruction, repairs, servicing, or maintenance of such facilities after they are dedicated to use,

nor does said term include the construction of drilling rigs. "Oil field construction work" is essentially local in nature and does not comprise the production of goods for commerce. Employees engaged in oil field construction work are engaged in such activities as those described. (Affidavit, R. 15 at 16-17).

Testimony at the hearing indicates that petitioner and its employees are and have been engaged in oil field construction work (R. 19), in that they make new, original and permanent installations as follows: tank batteries, which consist of one or more tanks connected up with a heater and other equipment for the production of oil after the tanks are built, including dirt work necessary to the construction thereof and of fire walls around the tanks (said tank batteries to be ultimately tied into gathering systems); gathering lines and lease lines for gathering oil from the wells to the tanks; lease roads to wells; buildings, including two new and original warehouses under construction for Syd Richardson Carbon Company at the time of the hearing, and small buildings for tool houses; installation of service lines such as water, gas and sewer lines, and septic tanks for municipalities and in lease camps for Magnolia, Ted Weiner Oil Company, and H. L. Hunt. Said facilities have not previously been used in carrying any product in interstate commerce before the construction is complete. (R. 19, 21, 23-27, 28).

The record shows that such work has been done by petitioner within the year before the hearing in Ector,

Ward, Midland, Glasscock and Upton Counties, all within the State of Texas, thus establishing the fact that petitioner was engaged in local construction. All of such work is new and original construction of permanent installations and is completed prior to the dedication thereof to use for the production of oil. (R. 19, 24, 25, 28).

Some of such facilities, when completed and dedicated to use, may become instrumentalities of commerce in that they may be used in commerce or in the production of goods for commerce. But the local new and original construction of facilities which may or will, after completion, be used in commerce or in the production of goods for commerce, is not commerce or the production of goods for commerce. Until such construction is completed there is neither commerce nor production of goods for commerce.

Such activities as those here involved have been repeatedly held not to be within the scope of the Coverage of the Fair Labor Standards Act. *Crabb v. Welden Bros.*, 164 F. 2d 797 (C. A. -8, 1947); *Kelly v. Ford, Bacon & Davis, Inc.*, 162 F. 2d 555 (C. A.-3, 1947); *Laudadio et al v. White Construction Co.*, 163 F. 2d 383 (C. A.-2, 1947); *McDaniel v. Brown & Root*, 172 F. 2d 466 (C. A.-10, 1949); *Nieves et al v. Standard Dredging Corporation*, 152 F. 2d 719 (C. A.-1, 1945); *Noonan et al v. Fruco Construction Company*, 140 F. 2d 633 (C. A.-8, 1943); *Parham et al v. Austin Co.*, 158 F. 2d 566 (C. A.-5, 1946); *Scholl v. McWilliams Dredging Co., et al*, 169 F. 2d 729 (C. A.-2, 1948); *Baloc v. Foley Bros.*, 68 F. Supp. 533 (D. C. Minn.,

1946); *Brue v. Steers, Inc.*, 60 F. Supp. 668 (D. C. N. Y., 1945); *Clyde v. Broderick, et al*, 52 F. Supp. 533 (D. C. Colo., 1943), rev'd on other grounds, 144 F. 2d 348 (C. A.-10, 1944); *Trefs v. Foley Bros, Inc., et al*, 84 F. Supp. 159 D. C. Mo., 1943); *Wells v. Ford, Bacon & Davis, Inc.*, 6 F. R. D. 606 (D. C. Ky., 1943), aff'd. per curiam, 145 F. 2d 240 (C. A.-6, 1944).

The view that employees engaged in the original construction of buildings or facilities are not within the coverage of the Fair Labor Standards Act, even if the building or facility, when completed, will be used to produce goods for commerce, is supported, we think, by the action of this court in *Murphy v. M. T. Reed, et al*, 335 U. S. 865. In that case the Court of Appeals for the Fifth Circuit, 168 F. 2d 257, had held that employees of a contractor under a cost-plus-a-fixed-fee contract for the original construction of a Navy camp for training construction battalions (Sea Bees) and a Naval Advance Depot at Gulfport, Mississippi, were not within the coverage of the Fair Labor Standards Act of 1938, and that certain other employees, performing work under a cost-plus-a-fixed-fee contract for the maintenance and operation of such facilities, were likewise not within the coverage of such Act, and reversed a decision of the District Court holding that both groups of employees were within the coverage of such Act. This Court granted certiorari and directed that the judgments below be vacated and the case remanded to the District Court with instructions to dismiss those causes of action involving solely construc-

tion work and to reconsider the remaining cause of action. *McDaniel v. Brown & Root*, 172 F. 2d 466, (C. A.-10, 1949), at 471 n. 4.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the United States Court of Appeals for the Fifth Circuit herein.

Dated March 2, 1953.

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Signatures of Counsel

Affidavit of Service by Mail

J. Henry Wilkinson, Jr., being duly sworn, says that he deposited a copy of the foregoing and annexed petition for writ of certiorari and brief of petitioner in the United States post office in the city of Dallas, Texas, enclosed in an envelope duly addressed to attorney for respondent at his business address, as follows:

SOLICITOR GENERAL

Washington, D. C.,

with postage fully prepaid, on the 3 day of March, 1953.

J. Henry Wilkinson, Jr.

Sworn to before me this 3 day of March, 1953.

Jno. W. Parker, Clerk
U. S. Dist. Courts
Nor. Dist. of Texas
By Romelle Hamilton
Deputy Clerk